Supreme Court, U.S.
FILED
JUL 24 1998
CLERK

No. 97-1472

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

RECEIVED
JUL 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Stephen M. Kohn
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980
Counsel for Amicus Curiae
National Whistleblower Center
Counsel of Record

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37(3)(b) of the *Rules of the Supreme Court of the United States* (hereinafter "Rules"), the National Whistleblower Center (hereinafter "Center") moves, by and through counsel, for leave to file an *amicus curiae* brief in support of Petitioner in the above-captioned matter.

Pursuant to Rule 37(3)(a) of the Rules, the Center sought written consent from all the parties to the case to file an *amicus curiae* brief . The Center obtained such consent from every party save one, Respondent Dennis Kelly, who appears *pro se*. Mr. Kelly is currently incarcerated in Effingham County Jail, Springfield County, Georgia and has verbally informed the Center of his decision to withhold his consent to the filing of an *amicus curiae* brief by the National Whistleblower Center.

The Center is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. As such, the Center works directly with whistleblowers nationwide who have a direct and substantial interest in the outcome of this case. *See* Statement of interest, *infra*.

By filing an *amicus curiae* brief, the Center strives to help the Court by bringing to its attention relevant matter not already presented to the Court by the parties. For this reason and the reasons stated above, the National Whistleblower Center requests leave to file an *amicus curiae* brief in this matter.

Respectfully submitted,

Stephen M. Kohn

Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980

Counsel for Amicus Curiae
National Whistleblower Center
Counsel of Record

July 24, 1998

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE PLAIN AND UNAMBIGUOUS MEANING OF "PERSON" AND "PROPERTY" CONTAINED IN 42 U.S.C § 1985(2) PROTECTS "AT-WILL" EMPLOYEES FROM RETALIATION. 5

A. The Lower Court in This Case Failed to Apply The *Robinson* Analysis 5

B. The Drafters of the Civil Rights Act of 1871 Understood the Right to Labor as Protected under Both the "Person" and "Property" Terms Used in 42 U.S.C. § 1985(2) 8

II. 42 U.S.C. § 1985(2) SHOULD BE INTERPRETED CONSISTENT WITH ITS LEGISLATIVE INTENT IN LIGHT OF THE INCONSISTENCY CREATED BY THE LOWER COURTS 13

A. Congress Intended to Provide a Remedy for Witnesses and Parties to Federal Proceedings Who Are Denied the Right to Sell Their Labor as a Result of Private Conspiracies 13

B. Congress Intended to Uphold the Integrity of the Judicial Process 18

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Bob Jones University v. United States,
461 U.S. 574 (1983) 6

Brockmeyer v. Dunn & Bradstreet,
335 N.W.2d 834 (Wis. 1983) 7

Brown v. Duchesne,
60 U.S. (19 How.) 183 (1856) 6

Brown v. Orvis,
6 How. Prac. 376 (1851) 10

Estes v. Texas,
381 U.S. 532 (1965) 19

Garcia v. United States,
468 U.S. 70 (1984) 13

Griffin v. Breckenridge,
403 U.S. 88 (1971) 6

Kelly v. Huffington,
3 Cranch. Federal Case No. 7,671 (1827) 10

Kimball v. D.J. McDuffy, Inc.,
648 F.2d 340 (5th Cir. 1981) 5

Kush v. Rutledge,
460 U.S. 719 (1983) 5, 8

Morast v. Lance,
807 F.2d 1926 (11th Cir. 1987) 8, 11

Nye v. United States,
313 U.S. 33 (1941) 19

Robinson v. Shell Oil Co.,
117 S.Ct. 843 (1997) . . . . . passim

Slaughter-House Cases,
83 U.S. (16 Wall.) 36 (1872) 11-12

United States v. Price,
383 U.S. 787 (1966) 6, 14

Wilson v. Garcia,
471 U.S. 261 (1985) 20

STATUTES

42 U.S.C. § 1985 (Civil Rights Act of 1871) . . . . . passim

42 U.S.C. § 2000e-3(a) 6

LEGISLATIVE MATERIALS

Cong. Globe, 39th Cong.,
1st Sess. 1151-52, 1160 (1866) 14-15, 19-21

Cong. Globe, 42nd Cong.,
1st Sess. 338, 340-41, 481 (1871) 15-16

Cong. Globe, 42nd Cong.,
2nd Sess. 51, 110, 320-30, 653, 1274-76, 653 . 17, 21

Testimony Taken by the Joint Selection Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States,
42nd Legis., 2nd Sess. (1871-72) 17-18

TREATISES AND OTHER MISCELLANEOUS

1 *Adam Smith's Wealth of Nations* Ch. 10 Part 2 12

1 *Blackstone's Commentaries on the Laws of England*
§ 1 (William S. Hein & Co. 1992) 9

2 *Bouvier's Law Dictionary* 326 (. 9

5 *Jacob's Law Dictionary* 144 (1811) 9, 11

2 *Kent's Commentaries* 10

4 *Tucker's Blackstone's Commentaries*
§ 1 No. 1 and § 8 No. 3 9-11

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center (Center)[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employees who have suffered retaliation due to the disclosure of matters in the interest of public health and safety. The Center aids employee whistleblowers who have been involved in environmental protection, nuclear safety, government accountability, and the advocacy of important public policy.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 33 states) and maintains an in-depth and informative Internet web site at *www.whistleblowers.org*. In 1990, the Center was admitted by this Court as an *amicus* in *English v. General Electric*, 110 S.Ct. 2270 (1990).

The Center works directly with whistleblowers nationwide, many of whom, similar to Petitioner in this case, have testified or will testify in federal proceedings. These whistleblowers have a distinct and substantial interest in the outcome of this case.

---

[1] Pursuant to Rule 37.6, the Center maintains that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's counsel, Stephen M. Kohn, authored this brief in its entirety.

Counsel for Petitioner Michael A. Haddle and Respondents Jeanette G. Garrison, G. Peter Molloy, Jr., Healthmaster, Inc., and Christopher Garrison consented to the filing of an *amicus curiae* brief by the Center in this matter. Respondent Dennis Kelly, who appears *pro se*, did not grant his consent to the filing of an *amicus curiae* brief by the Center.

SUMMARY OF THE ARGUMENT

The Civil Rights Act of 1871, codified in relevant part as 42 U.S.C. § 1985(2), prohibits private conspiracies which may injure the "person or property" of a witness or party in a federal judicial proceeding. Consistent with the Reconstruction Era understanding of the terms "person" and "property," and consistent with the specific legislative intent behind the Act, the loss of "at-will" employment is an injury cognizable under both the "person" and "property" terms used in 42 U.S.C. § 1985(2).

In *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997), the Supreme Court set forth guidance on interpreting statutes:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning . . . The plainness or ambiguity . . . is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Id. at 846.

Applying this rule to the Civil Rights Act of 1871, 42 U.S.C. § 1985, the statute unquestionably protects "at-will" employees from retaliation or loss of employment as a result of testifying or participating in a federal proceeding covered under § 1985(2).

The statute prohibits private conspiracies to undermine "at-will" employment of witnesses or parties to federal proceedings. The plain meaning of "person or property" at the time the law was passed covers the right to sell one's labor. In

fact, the right to sell one's labor was an essential component of personal and property rights understood by the legislators in Reconstruction Congresses. Moreover, the Reconstruction Act Congressmen themselves directly pointed to the right to freely sell one's labor as fundamental to the Reconstruction laws. Therefore, interference with employment, "at-will" or otherwise, was prohibited under the core intent of the Civil Rights Act of 1871.

ARGUMENT

I. THE PLAIN AND UNAMBIGUOUS MEANING OF "PERSON" AND "PROPERTY" CONTAINED IN 42 U.S.C. § 1985(2) PROTECTS "AT-WILL" EMPLOYEES FROM RETALIATION.

A. The Lower Court in This Case Failed to Apply The *Robinson* Analysis.

This case concerns an interpretation of Section 2 of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2) (hereinafter §1985(2)), a Reconstruction Era civil rights statute.[2] The law prohibits private conspiracies against witnesses or parties in federal judicial proceedings. *See Kush v. Rutledge*, 460 U.S. 719 (1983).[3]

---

[2] The statutory provision that is now codified as § 1985 of Title 42 of the United States Code was originally enacted as § 2 of the Civil Rights Act of 1871, 17 Stat. 13. *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). The present wording of § 1985(2) dates to the 1874 consolidation of the then widely scattered federal laws into the Revised Statues of the United States. Section 1980 of the Revised Statutes consolidated the Conspiracy Act of 1861, 12 Stat. 284, and the Civil Rights Act of 1871, 17 Stat. 13. The section at issue in this case, R.S. § 1980(2) is now, without change, 42 U.S.C. § 1985(2). In passing the 1874 Consolidation Act, Congress did not intend to change the meaning of the laws even though it made minor changes in language. At that time, Congress made it clear that discrepancies between the original acts and the Revised Statutes were to be resolved by consulting the original acts. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 344-45 (5th Cir. 1981), *cert. denied*, 454 U.S. 1100 (1981) (citing 20 Stat. 27 (1878)).

[3] Civil Rights Act of 1971 § 2, 42 U.S.C. § 1985(2) (Supp. III 1979). The pertinent text outlaws actions when:

> . . . two or more persons in any State or Territory

It is now well settled that in interpreting Reconstruction Era civil rights statutes, this Court accords them "a sweep as broad as [their] language."[4] Moreover, applying this Court's decisions on statutory construction,[5] as recently set forth in the unanimous opinion in *Robinson v. Shell Oil Co.*,[6] the lower court must be reversed.

In *Robinson*, the Court delineated a method of statutory construction in which determination of whether a term is ambiguous or not revolves around the context surrounding the term itself, its relation to the rest of the statute, and the broader context of the statute as a whole:

---

conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified. . . .

[4] *See United States v. Price*, 383 U.S. 787, 801 (1966); *accord, Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

[5] The Court has a history of subjecting like statutes to similar methods of statutory construction that serve to advance the purpose of the statute. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) (stating, in interpreting tax laws, that "it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute"); *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856) (stating, in interpreting patent laws, that the court will not look merely to a particular clause, but will consider the entire statute and construe it to conform to the will of the legislature).

[6] *See* 519 U.S. 337, 340 (1997) (Thomas, J., construing term "employees" in context of §704(a) of Title VII of the Civil Rights Act of 1964 to include former employees, in light of broader context of Title VII as a whole, and the purpose of the specific anti-retaliation provision at issue).

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.[7]

Applying this rule to § 1985(2), the terms "person or property" contained in the law are not ambiguous and unquestionably encompass conspiracies to interfere with employment, "at-will" or otherwise.[8]

The statute at issue in this case, the Civil Rights Act of 1871, § 1985(2), protects the rights of witnesses and parties to

---

[7] *Id.* (internal citations omitted).

[8] Significantly, the distinction between "at-will" and "non-at-will" employment would have been meaningless to the members of Congress who drafted the Civil Rights Act of 1871. As set forth in part II of this Argument, members of Congress were concerned about the right of persons to sell their labor freely on the open market. Whether this labor was performed on an hourly basis, with the right of either party to terminate the relationship at any time, or whether this labor was performed under the terms of a written contract which limited the employer's right to discharge an employee, was completely immaterial to the debates in Congress and the understanding of labor markets in 1871. Significantly, the "at-will" rule relied upon by the Respondents and the lower courts was first set forth in a treatise published in 1877, six years after the adoption of the Civil Rights Act. *Brockmeyer v. Dun & Bradstreet*, 335 N.W. 2d 834, 837 (Wis. 1983). It was not until after 1877, in the "late nineteenth century," that the "at-will" doctrine was articulated and adopted by various courts in this country. *Id.*

federal judicial proceedings.[9] In *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987),[10] the Eleventh Circuit ruled that a federal witness who had been fired from his job in retaliation for testifying in a federal judicial proceeding could not state a remediable claim under § 1985(2). In construing the term "property," the Eleventh Circuit prevented at-will employees from asserting a property interest, holding that such employees have no constitutionally protected property interest in continued employment. *Id.* This decision, however, failed to properly apply the *Robinson* analysis, and as a result, the decision of the Eleventh Circuit in the case at bar is infirm.

B. The Drafters of the Civil Rights Act of 1871 Understood the Right to Labor as Protected under Both the "Person" and "Property" Terms Used in 42 U.S.C. § 1985(2).

A proper understanding of the context in which the language of § 1985(2) is cloaked requires knowledge of the terms involved as they were originally intended. The key terms at issue in this case are "person" and "property," for it is injuries to these that create a right of action under the statute.

The term "person" was understood since the time of Blackstone to include two distinct types of persons. The law

[9] *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

[10] *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) (holding that a complainant failed to properly state a claim because "at-will" employees have no constitutionally protected property interest in their continued employment. Significantly, the lower court in this case relied upon *Morast* in deciding the case at bar).

divided persons into "natural" and "artificial" persons.[11] The earliest notions of rights flowed from this distinction, and it is from them that lawmakers at the time of the enactment of § 1985(2) gained their understanding of the terms relevant to this case. Significantly, two of the leading law dictionaries of the time, produced expressly for lawmakers, stood in accord with Blackstone's exposition.[12]

Blackstone explained the manner in which rights attached to one's status as a natural person, classifying rights as either "absolute" or "relative":

> There are two classes of rights, absolute and relative. Absolute rights are those such as appertain and belong to men merely as individuals or single persons. (They are) those which are so in their primary and strictest sense. Relative rights are those which are incident to them as members of society.[13]

[11] *Tucker's Blackstone's Commentaries*, Book 1, § 1. Wherein Blackstone posited that:

> [P]ersons are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.

[12] *See, e.g.*, 5 *Jacob's Law Dictionary*, 144 (1811) (Repeating Blackstone's maxim, verbatim); 2 *Bouvier's Law Dictionary* 326 (1868) (defining "person" similarly: "The term is more extensive than man, including artificial beings, as corporations, as well as natural beings.")

[13] *See* 1 *Blackstone: Commentaries on the Laws of England*, Book 1, § 1, (Williams S. Hein & Co., 1992).

Within the realm of personal security was a natural person's right to their reputation.[14] That this idea was accepted in America is evidenced in the vast body of law which has come today to be called the law of defamation. During the time prior to and surrounding the enactment of the Civil Rights Act of 1871, defamation in the form of either libel or slander was a widely accepted cause of action, for injuring a person's right to their reputation. This cause of action grew over time from a simple tort to one which included the notion of "slander *per se*" for injury to a person's reputation.[15]

Significantly, damages to reputation were recoverable *because* they impacted on the personal right to engage in a "trade"[16] or earn a "livelihood." *Id.* Wrongful action which rendered a person "unworthy of employment,"[17] such as slander, was included in the penumbra of personal injuries widely recognized in 1871 in the definition of injury to person.

Based upon this rich history, chronicled and enlivened by Blackstone, the lawmakers who drafted and enacted the Civil Rights Act of 1871 understood "person" to include a

---

[14] *See Tucker's Blackstone's Commentaries,* Book 4, Chapter 8, Number 3 (recognizing that damages to a man's reputation under the common law action for slander are recoverable because they harm that individual's trade or livelihood); *Kent's Commentaries, Volume II,* (stating as a "part of the right of personal security, the preservation of every person's good name. . . is justly included . . . when . . . [the charge] would render him unworthy of employment.")

[15] *See, e.g., Kelly v. Huffington,* 3 Cranch 81, Federal Case No. 7,671 (1827) (creating a cause of action for imputations injurious to a man's profession or business); *Brown v. Orvis,* 6 How. Prac. 376 (1851) (recognizing that terms which inherently injure one's business or trade are effectively slanderous, *per se*).

[16] *See Tucker's Blackstone's Commentaries, supra,* note 11.

[17] *See Kent's Commentaries, supra,* note 11.

natural person with the right to, and an interest in his ability to, earn a "livelihood" by gaining "employment." Congress must, then, have understood an injury to one's person to necessarily include an injury to one's ability to work. And this is precisely where the court in *Morast* and the lower court here failed. They neglected to follow *Robinson* and understand the terms of § 1985(2) in context, as the drafters of the statute understood them.

Likewise, the term "property" developed a common meaning in America as a result of the writings of Blackstone and others. Blackstone's third absolute right was that of property:

> Which consists in the free use, enjoyment, and disposal of all one's acquisitions, without any control or diminution, save by the laws of the land.[18]

From the notion of property arose the idea that a person's labor is their property. This is reflected, again, in the legal dictionaries created for lawmakers of the time.[19] That the legislators of the time were aware of this definition of labor as property is reflected in the Supreme Court's fractured opinion in the *Slaughter-House Cases*, 83 U.S. 36 (1872), where, though the Court could not reach a strong majority on the case at hand, both sides were able to agree that a person's property right included the right to labor freely.[20]

---

[18] *See Blackstone, supra,* note 11, at Number 3.

[19] *See Jacob's Law Dictionary, supra,* Vol. 4, at 66.

[20] *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, (1872). Significantly, this 5-4 decision included 3 separate dissenting opinions in which the dissenters agreed with the majority as to the nature of a person's right to property, including property in their labor.

The majority opinion in *Slaughter-House Cases* recognized that the Reconstruction Era Congresses were concerned about the right of the newly freed slaves to obtain *employment*, whether as an "at-will" employee or as a contract employee. The majority noted that the post-Civil War Congress was very concerned that former slaves were "excluded from many occupations of gain" and recognized that these exclusions impacted fundamental rights of "life, liberty and property to such an extent that their freedom was of little value."[21]

Justice Swayne, in his dissent, explicitly recognized that, during the Reconstruction Era, it was widely recognized that "labor is property, and as such should be protected."[22]

Justice Field, also in dissent, quoted Adam Smith, for the proposition that "the property which every man has in his own labor at is the foundation of all other property, so it is the most sacred and inviolable."[23] This completes an interesting cycle which begins with Blackstone, runs through the legal dictionaries of the time, to contemporary case law and Supreme Court commentary, and finds its source back in the writings Smith.

This is a rich tradition which clearly influenced, colored, and determined how Congress thought about the terms they included in the Civil Rights Act of 1871. It is only through an understanding of this tradition that a court can properly apply the *Robinson* framework and accurately construe § 1985(2) according to the intent of the original framers.

---

[21] *Id.*, at 70.

[22] *Id.*, at 127 (Swayne, J. dissenting).

[23] *Id.*, at 111 (Bradley, J., dissenting) (citing *Smith's Wealth of Nations*, Book 1, Chapter 10, Part 2).

As forcibly articulated by the respected legal treatises widely utilized in or about 1871, there was a strong and overriding consensus that the right to obtain employment, "at-will" or otherwise, was a fundamental personal and property right. When Congress used the words "person" and "property" in the Civil Rights Act of 1871, they intended to protect witnesses in and parties to federal proceedings from retaliation in employment, "at-will" or otherwise.

II. 42 U.S.C. § 1985(2) SHOULD BE INTERPRETED CONSISTENT WITH ITS LEGISLATIVE INTENT IN LIGHT OF THE INCONSISTENCY CREATED BY THE LOWER COURTS.

Regardless of whether this Court finds the language of § 1985(2) ambiguous, it should still evaluate the statute within the context of the Civil Rights Act of 1871 to remedy the inconsistent statutory scheme created by the lower court. This Court looks to the "primary purpose" of legislation as a guide to its meaning. *Robinson v. Shell,* 117 S.Ct. 843, 848 (1997). Section 1985(2) is derived from the Civil Rights Act of 1871. The legislative history of that Act, therefore, is a useful "tool of analysis" for interpreting § 1985(2). *Garcia v. United States*, 469 U.S. 70, 75 (1984).

A. Congress Intended to Provide a Remedy for Witnesses and Parties to Federal Proceedings Who Are Denied the Right to Sell Their Labor as a Result of Private Conspiracies.

The legislative history of the Reconstruction Era civil rights laws, including the history of the Civil Rights Act of 1871, unquestionably supports the proposition that the right to sell one's labor as an employee, "at-will" or otherwise, was intended to be protected under § 1985(2).

In debates on the predecessor law to § 1985(2), the

Civil Rights Act of 1866,[24] Congress intended to protect the freedom of the newly emancipated slaves to sell their labor on the free market. In fact, the right to sell labor, whether under a written contract or as an "at will" employee, was at the heart of the liberty interests Congress intended to protect through the Reconstruction civil rights laws. For example, Congressman William Windom (R-Minn.) stressed the importance of the freedom to work:

> Do you call that man free who cannot choose his own employer, or name the wages for which he will work? Do you call him a freeman who is denied that most sacred of all possessions, a home? Is he free who cannot bring a suit in court for the defense of his rights? Sir, if this be liberty, may none ever know what slavery is.

Cong. Globe, 39th Cong., 1st Sess. 1160 (1866).

Later in the debate, Congressman Martin Russell Thayer (R-Pa.) stated:

> [L]aws which impair [the emancipated slaves'] ability to make contracts for labor in such a manner as virtually to deprive them of the power of making such contracts, and which then declare them vagrants. . .because they have no employment; . . . I demand to know, of what practical value is the amendment to abolish slavery in the United States?

---

[24] The court has looked at the "events and passions of the time" and the "context" in which Congress enacted the Reconstruction laws as a guide to interpreting the Reconstruction Era Civil Rights statutes. *United States v. Price*, 383 U.S. 787, 803-4 (1966).

Id. at 1151.

The legislators who passed the Civil Rights Act of 1871 also recognized that selling one's labor, whether as an "at will" employee or not, was one of the fundamental rights of property and person which were intended to be protected under the 1871 law. For example, Senator James Kelley (D-Or.) stated:

> [The emancipated slaves'] deplorable condition is the result of the infernal system of slavery, which denied wages to the laborer, and so robbed toil of the dignity and aspirations and capital of its just rewards . . . The outraged colored people of the South have earned the dollars, grown the cotton, the tobacco, the rice, cut the timber, built the factories, to which the gentleman from Tennessee [Mr. Whitthorne] referred; and shall they enjoy none of them?

Cong. Globe, 42nd Cong., 1st Sess. 338, 340 (1871).

Moreover, Congress recognized that one of the core provisions of the Civil Rights Act of 1871 was the protection of employment, "at-will" or otherwise, of both the newly-freed slaves and white persons of the South. The personal and property rights of persons covered under § 1985(2) included the right to "steadiness of employment." Senator Kelley, on the floor of the Senate, stated:

> The sooner they quicken into fruition the hopes, aspirations, and energies of the blacks and the poor whites of the South, by giving them steadiness of employment, by inviting to their midst capital to advance industrial enterprises, the sooner will they enjoy peace and safety and a measure of prosperity which no part of the South has ever enjoyed.

Id. at 341.

Mr. Kelley also told the story of two young farmers from Pennsylvania "without politics or political affiliation" who were murdered after attempting to establish a farm in Mississippi. *Id.* Mr. Kelley reported that "[t]he neighbors who had annoyed them to that time would not permit them to enjoy the fruits of their labor." *Id.* Thus, the Civil Rights Act of 1871 was enacted to protect the basic right of all people, whether they be former slaves or northern farmers, to enjoy "the fruits of their labor."

These comments by the legislators who passed the Civil Rights Act of 1871, later encoded in relevant part as § 1985(2), indicate that Congress intended to protect the most basic of all freedoms, the freedom to sell one's labor in the open market.[25] Congress was spurred to act in defense of this freedom as a result of the numerous private conspiracies which worked to

---

[25] The intent of Congress to prohibit conspiracies against the private employment of persons covered under the Civil Rights Act of 1871 is also clearly indicated in debates on portions of the Act which concern state action, as opposed to purely private conspiracies. For example, Congressman Wilson declared unequivocally that a state law that penalized an employer for hiring a certain class of persons would be unconstitutional:

> There are fundamental rights or privileges, and no State has any right by its laws to deny them. Suppose, now, that a State should pass a law authorizing slavery, or denying the right to vote to persons of color, or, as I blush to say was the case in the State of Indiana, forbidding a certain class of persons from entering the State, and forbidding under heavy penalties any one from giving employment to any such person . . . this would be a deprivation of constitutional right and privilege. The State has no right to pass any such law.

Cong. Globe, 42nd Cong., 1st Sess. 481 (1871).

destroy the exercise of this freedom.

Senator Thomas Ward Osborn (R-Fla.) brought home the point that the Civil Rights Act was necessary to secure the rights guaranteed by Thirteenth and Fourteenth Amendments:

> What shall we do to maintain order and to punish the guilty in a community where a large proportion of the people are bound together by oaths and obligations, having pass-words, signs of recognition, and whose well-defined and clearly-proven object is to gain political control by intimidation and murder.

Cong. Globe, 42nd Cong., 2nd Sess. 653 (1871).

When drafting the Civil Rights Act of 1871, Congress interviewed hundreds of witnesses and complied a 13 volume Senate report numbering more than 7000 pages.[26]

Witnesses at the Senate Hearing testified to the Ku Klux Klan's power in Alabama, North Carolina, South Carolina, Mississippi, Florida, Georgia, and Louisiana. *Id.* Railroad contractor William Howle from North Carolina was driven out of business and forced into bankruptcy after Klan members threatened workers who helped with his construction. Howle, who needed 30 to 40 workers at each contract site, could find no workers willing to work for him at any of his sites after Klan members threatened and whipped workers who did show up. *Id.* at 51. The county magistrate refused to press charges, and Howle was eventually driven to bankruptcy and forced to leave the state. *Id.*

---

[26] *Testimony Taken by the Joint Selection Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42nd Legis., 2nd Session (1871-82).

Mechanic James M. Justice told Congress that he withdrew as a juror in a case against a Klan member because Klan members threatened to kill him unless he gave way for other "Klan affiliated" jurors. *Id.* at 110. Alabama Probate Judge William Blackford and US District Judge of Alabama Richard Busteed testified that juries in Alabama were rigged so that no member of the Klan could ever be convicted. When Judge Blackford complained to state officials, Blackford was told to resign if he was unhappy. *Id.* at 320-30, 1274-76.

The gravamen of this history is that at the time Congress drafted the Reconstruction statutes, it expressly sought to prevent the economic and social destruction of individuals by private conspiracies. Although the witness statements from the Senate Hearings are extreme, they differ only by degree from the type of retaliation experienced by Mr. Haddle. Mr. Haddle was fired as a result of his willingness to testify against his employer. As evidenced by the legislative history, Congress was well aware of the use of hiring boycotts by conspirators to harass or intimidate those with whom they disagreed.[27] The result of the private conspiracies, however, is the same, regardless of whether the individual is precluded from being hired or is fired: The person is denied his right to sell his labor on the open market.

B. Congress Intended to Uphold the Integrity of the Judicial Process.

The policy and intent behind the creation of § 1985(2) supports protection of the judicial process in order to ensure complete and equal access to the laws, rights, and protections granted to every citizen of the United States. Only through

---

[27] *Testimony Taken by the Joint Selection Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42nd Legis., 2nd Session (1871-82), at 51.

unobstructed access to every aspect of the judicial process can citizens be protected under the law[28].

This Court has expressed the importance of protecting the sanctity of the judicial process by ensuring complete access to a fair trial. In *Estes v. Texas*, 381 U.S. 532 (1965), the Court reversed a criminal conviction on the grounds that the media interfered with the defendant's right to a fair trial:

> We have always held that the atmosphere essential to the preservation of a fair trail -- the most fundamental of all freedoms -- must be maintained at all costs.

Estes, 381 U.S. at 540. In *Nye v. United States*, 313 U.S. 33 (1941), the Court reversed a decision to dismiss an action after it found that the plaintiff was improperly persuaded to dismiss his claim:

> The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. . . . We may concede that there was an obstruction in the administration of justice.

Nye, 313 U.S. at 52 (1941).

The Respondents in the present case interfered with the judicial process by punishing Mr. Haddle for preparing testimony in a court of law against them. If this court does not

---

[28] *Cong. Globe*, 39th Cong., 1st Sess. 1160 (1866)(Remarks of Rep. Windom)("Do you call that man free who cannot. . . . bring a suit in court for the defense of his rights? Sir, if this be liberty may none ever know what slavery is.")

reverse the lower court's holding in this case, the effect will be to allow the Respondents to obstruct the judicial process and destroy the necessary "atmosphere" surrounding a fair trial. Threatening an "at-will" employee's job, or terminating "at-will" employees from work, in retaliation for testifying in federal judicial proceedings will create an atmosphere of intimidation destructive to the judicial process. This is precisely the harm that Congress sought to prevent in passing Section 2 of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2).

As Justice Stevens pointed out in *Wilson v. Garcia,* 471 U.S. 261, 276 (1985):

> The specific historical catalyst for the Civil Rights Act of 1871 was campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights.

Justice Stevens remarked on the goal of the Act: "By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement." *Id.* at 277.

Again, the legislative history of the Reconstruction Era civil rights laws document the Congressional concern over judicial integrity. In debating the 1866 Civil Rights Act, Congressman Thayer questioned the practical value of the 13th Amendment if the right to justice is not enforced:

> What kind of freedom is that under which a man . . . may be deprived of the right to be a party or a witness in a court of justice, or may be subjected to pains and penalties which are not inflicted upon other citizens?

Cong. Globe, 39th Cong., 1st Sess. 1152 (1866).

The legislative history of the Civil Right Act of 1871 indicates the Congressional intent to uphold the integrity of the judicial system. Congressman John Sherman (R-Ohio) stated:

> The point I wish to get at is this: it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.

Id. at 345.

Senator Osborn most passionately questioned the viability of the 13th and 14th Amendments if emancipated slaves had no protection from private conspiracies that were otherwise determined to obstruct the justice of equal protection under the law. He stated:

> What can we do when such men are allowed to crowd each other forward upon juries and upon the witness-stand, with no purpose or object but to swear to truth or falsehood, to condemn or to acquit as may best advance the interests of their order? Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice.

Cong. Globe, 42nd Cong., 2nd Sess. 653 (1871).

The case at bar concerns allegations of a private conspiracy to undermine the employment of Mr. Michael A. Haddle because Mr. Haddle was a known witness in a federal proceeding against persons who engaged in criminal activities

and violated federal criminal laws. Any interference with Mr. Haddle's right to sell his labor and his right to obtain or retain employment, as an "at-will" employee or otherwise, was strictly prohibited under the core intent of the drafters of the Civil Rights Act of 1871.

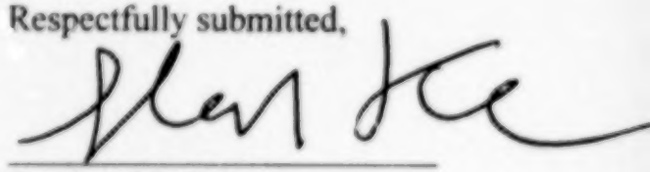
These legislators were imbedded with the anti-slavery principles premised upon the right of all persons to sell their labor freely on the open market. Whether the labor was sold through a written contract for a duration of time (i.e., "non-at-will") or was sold on an hour-to-hour basis at the pleasure of either the employee or the employer (i.e., "at-will" employment) was strictly immaterial. The right to sell labor was viewed as a fundamental component of a personal rights and/or property rights explicitly protected under § 1985(2).

The authors of § 1985(2) were fully aware that destroying a person's ability to obtain employment as a result of his or her participation as a witness or party in a federal proceeding would undermine the federal judicial process and undermine the laws of the United States. Under *Robinson*, 117 S.Ct. 843, § 1985(2) prohibits private conspiracies which interfere with the "at will" employment of witnesses or parties to federal proceedings.

CONCLUSION

For the foregoing reasons, this Court should uphold Petitioner's argument and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,



Stephen M. Kohn

Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980

Counsel for Amicus Curiae
National Whistleblower Center
Counsel of Record

July 24, 1998